B. THE THREE-JUDGE PANEL USURPED ITS JUDICIAL POWER WHEN IT INDEPENDENTLY ADJUDICATED MR. SINGH'S ASYLUM CLAIMS

On remand to the BIA from the prior Ninth Circuit's memorandum disposition filed on December 20, 2002, Pet. App. 5a-7a, the Singhs presented two claims[2] to support their applications for asylum and withholding of deportation: (1) a well-founded fear of *future* persecution on account of an imputed political opinion because of the close relationship to his brother, who was tortured and killed by the Punjab police because they believed he was a Sikh militant or supporter of the Sikh militants; and (2) a well-founded fear of *future* persecution on account of his membership in a particular social group, the Narinder/Harginder Singh social group. Pet. App. 15a-22a. *See Aguirre-Cervantes v. I.N.S.*, 242 F.3d 1169, 1174 (9th Cir. 2001) (recognizing that failure to raise issue before BIA deprives Court of jurisdiction to hear the matter).

With respect to the Singhs' first asylum claim, the BIA impermissibly applied *past* persecution asylum law to the Singhs' claims of *future* persecution on account of an imputed political opinion. *See Gormley v. Ashcroft*, 364 F.3d 1172, 1177 (9th Cir. 2004) (recognizing that a "showing of past persecution is not required to qualify for asylum."); *Fisher v. I.N.S.*, 37 F.3d 1371, 1377 (9th Cir. 1994) (stating that "[i]t has long been recognized, however, that past persecution and future persecution provide distinct avenues for obtaining eligibility for asylum."); *Al-Harbi v. I.N.S.*, 242 F.3d 882, 890 n.9 (9th Cir. 2001) (noting that future persecution on account of an imputed political opinion "also establishes a well-founded fear of persecution." Thus, it was

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[2] The claims were based on undisputed facts in the record and supported with documentary evidence. *See* Pet. App. 6a (Ninth Circuit noting that "the BIA found that Singh was credible" and remanding to address Singh's credible testimony "along with other evidence.").

legal error for the BIA to address the Singhs' asylum and withholding of deportation claims under *past* persecution eligibility standards.

The BIA based its decision in part on *Vera-Valera v. I.N.S.*, 123 F.3d 1302 (9th Cir. 1997). Pet. App. 9a. *Vera-Valera* is not applicable to the issues raised by the Singhs. *Vera-Valera* is an asylum case in which the applicant based his claim on *past* persecution on account of a political opinion, not on account of a well-founded fear of *future* persecution. In its decision, the BIA stated that the police have never arrested or detained Mr. Singh. The BIA also stated that Mr. Singh "has offered no evidence to suggest that the police have imputed a political opinion to him." Pet. App. 9a (emphasis added). The BIA seems to reason that because Mr. Singh has not been persecuted in the past, he is not eligible for asylum. The BIA's assessment of the undisputed facts is legal error. *See Mendez-Gutierrez v. Ashcroft*, 340 F.3d 865, 870 (9th Cir. 2003) (recognizing that "[a] finding that an asylum applicant has not suffered past persecution does not render the applicant ineligible for asylum if the applicant can show that he or she has a well-founded fear of future persecution.").

The BIA misconstrued the legal basis for the Singhs' asylum and withholding of deportation claims. "The BIA does not have the discretion to misapply the law, and it abuses its discretion when it does." *Mejia v. Ashcroft*, 298 F.3d 873, 878 (9th Cir. 2002) (citation omitted). Interestingly, the Court in *Vera-Valera* granted a petition for rehearing, withdrew its earlier decision, and concluded that "that holding was in error." *Vera-Valera v. I.N.S.*, 147 F.3d 1036, 1037 (9th Cir. 1998). Because the BIA abused its discretion in applying the wrong legal standard, the three-judge panel should have remanded the case to the BIA so that it could have applied the proper legal analysis under *future* asylum law. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (explaining that where the BIA has not made findings on an issue of fact,

"the proper course . . . is to remand to the agency for additional investigation or explanation).

More importantly, the BIA never addressed the Ninth Circuit's prior mandate on remand: "to allow the BIA to address whether Singh's testimony regarding his brother is sufficient, along with other evidence, to establish that petitioners are eligible for asylum or withholding of deportation based on claimed persecution by the police." Pet. App. 6a-7a. Aside from acknowledging the issue, the BIA failed to address the persecution and death of Mr. Singh's brother by the Indian police, or how Mr. Singh's brother's circumstances affected Mr. Singh's eligibility for asylum and withholding of deportation. Pet. App. 9a. "In such cases, 'the trier of fact must examine how close a relationship exists between the persecution of family members and the situation of the applicant.'" *Ventura v. I.N.S.*, 264 F.3d 1150, 1154 (9th Cir. 2001) (rev'd on other grounds) (citation omitted) (emphasis added). "For [the Ninth Circuit] to review BIA decisions, the agency must adequately explain why it does not find the evidence of threats credible or persuasive and the relevant documents authentic when that evidence goes to the heart of whether there is a fear of future persecution." *Gailius v. I.N.S.*, 147 F.3d 34, 46-47 (9th Cir. 1998).[3] The Ninth Circuit has also "held that the BIA must 'indicate with specificity that it heard and considered petitioner's claims.'" *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855, 858 (9th Cir. 2004) (emphasis added). The three-judge panel should have remanded the case to the BIA under the authority of *INS v. Ventura*, 537 U.S. 12, 16 (2002) (explaining that where the BIA has not made findings on an issue of fact, "the proper course . . . is to remand to the agency for additional investigation or explanation).

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[3] The claims were based on undisputed facts in the record and supported with documentary evidence. *See* Pet. App. 6a.

Moreover, this Court has stated that "[d]eviation from the court's remand order in the subsequent administrative proceedings is itself legal error, subject to reversal on further judicial review." *Sullivan v. Hudson*, 490 U.S. 877, 886 (1989). Because it was legal error for the BIA to apply the wrong asylum law standard, as well as failing to address the Ninth Circuit's prior mandate, and also failing to examine how close a relationship existed between the persecution of family members and the situation of the applicant, the present three-judge panel was without jurisdiction to independently adjudicate Mr. Singh's asylum claim on account of an imputed political opinion. *See INS v. Ventura*, 537 U.S. 12, 16 (2002) (explaining that where the BIA has not made findings on an issue of fact, "the proper course . . . is to remand to the agency for additional investigation or explanation).

With respect to Mr. Singh's second claim of future persecution, based on undisputed facts and documentary evidence in the record, that he was eligible for asylum and withholding of deportation on account of his membership in the Narinder/ Harginder Singh social group, the BIA flat out failed to address it. "[T]he BIA was charged with the entirely straightforward task of considering [Singh's] argument before it, i.e., whether [Singh] feared future persecution on the basis of imputed political opinion. The BIA did not even 'purport[ ] to engage in any substantive analysis' of this issue, although [Singh] clearly presented it to the BIA . . ." *Mejia v. Ashcroft*, 298 F.3d 873, 879 (9th Cir. 2002). "The BIA therefore committed legal error when it held that [Singh] was not prima facie eligible for asylum. The BIA does not have the discretion to misapply the law, and it abuses its discretion when it does." *Id.*, at 878 (citation omitted) (emphasis added). "Failure by the BIA 'to support its conclusion [denying relief] with a reasoned explanation based upon legitimate concerns' also constitutes an abuse of discretion." *Velarde v. I.N.S.*, 140 F.3d 1305, 1310 (9th Cir. 1998) (citation omitted) (brackets in original). Because the

BIA refused to address Mr. Singh's asylum claim on account of membership in a particular social group, the three-judge panel's only course of action was to remand the case to the BIA under the authority of *INS v. Ventura*, 537 U.S. 12, 16 (2002) (explaining that where the BIA has not made findings on an issue of fact, "the proper course . . . is to remand to the agency for additional investigation or explanation).

The three-judge panel's disposition also conflicts with the Ninth Circuit's *en banc* opinion, decided *after* the panel's disposition, in *Thomas v. Ashcroft*, 409 F.3d 1177, 1180 (9th Cir. 2005) (holding that a family can be a particular social group, and "thus confer refugee status on a family member who has been persecuted or who has a well-founded fear of future persecution on account of that familial relationship.").[4] The *en banc* panel then remanded the case to the BIA under the authority of *INS v. Ventura* so that it can determine whether the threats and attacks directed at the petitioners rose to the level of persecution. *Id.*, at 1189. *See also* Judge Kleinfeld's concurrence in part and dissent in part, *Id.*, at 1192 (recognizing that "the law entrusts the agency to make the basic asylum eligibility decisions[,]" and "the Supreme Court has made it clear as can be that 'a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.'").

Astoundingly, in response to Mr. Singh's motion to rescind the memorandum decision based on the *en banc* opinion in *Thomas v. Ashcroft*, the three-judge panel blatantly refused to follow *INS v. Ventura* and *Thomas v. Ashcroft* and amended its prior memorandum disposition stating that: "The BIA permissibly concluded that Petitioner's fear of future persecution is not objectively reasonable whether the alleged reason for his fear is an imputed political opinion or, instead, is his family relationship to his brother." Pet. App.

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[4] Interestingly, the three-judge panel in the present case, Judge Kleinfeld, Judge Hawkins, and Judge Graber, were all members of the *en banc* panel in *Thomas v. Ashcroft*.

3a-4a (citing *Thomas v. Ashcroft*). It should be *crystal* clear and indisputable that the three-judge panel acted beyond its jurisdiction as commanded by *INS v. Ventura*. *See Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 309 (1989) (noting that petitioner met his demanding burden for writ of mandamus because the district court acted beyond its jurisdiction as *interpreted* by the Supreme Court).

Thus, while the three-judge panel had jurisdiction to review the BIA's final order, it did not have jurisdiction to independently determine whether the Singhs have established eligibility for asylum or withholding of deportation based on: (1) a well-founded fear of *future* persecution on account of an imputed political opinion by the Indian police because of the close relationship Mr. Singh had with his brother, who was tortured and killed by the police because they believed that he was a Sikh militant or supporter of the Sikh militants, ***and*** (2) a well-founded fear of future persecution on account of his membership in the Narinder/Harginder Singh family social group. In the present case, the BIA abused its discretion by failing to fully consider and address Mr. Singh's claims. *See Mohammed v. Gonzales*, 400 F.3d 785, 792-93 (9th Cir. 2005); *Mejia v. Ashcroft*, 298 F.3d 873, 879-80(9th Cir. 2002). In the words of Judge Kleinfeld, "the Supreme Court has made it ***clear as can be*** that 'a court of appeals should ***remand*** a case to an agency for decision of a matter that statutes place primarily in agency hands.'" (quoting *INS v. Ventura*).

C. THE THREE-JUDGE PANEL MERELY RUBBER-STAMPED THE BIA DECISION

Mr. Singh's life and freedom are at stake. "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country." *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 449 (1987). It is frightening that the three-judge panel in the present case would blatantly ignore controlling Supreme

Court and Ninth Circuit precedents to deny Mr. Singh's petition for review. While the merits of the Mr. Singh's asylum petition are not at issue in the present petition for writ of mandamus because the three-judge panel should have declined jurisdiction and remanded the case to the BIA, the record leaves no doubt that there is at least a *ten percent chance* (legal standard for well-founded fear of *future* persecution) that Mr. Singh would be persecuted in the *future* like his brother, who was in fact tortured and killed by the Punjab police because they believed he was a Sikh militant or supporter of the Sikh militants. "To hold otherwise would be to act as a rubber stamp or a decorative potted plant in disregard of Congress' expectation that we correct the BIA's factual decisions where that body has made an egregious mistake." *Jahed v. I.N.S.*, 356 F.3d 991, 1001 (9th Cir. 2004).

Unfortunately, there appears to be an underlying reason why appellate courts are acting as rubber stamps or decorative potted plants in denying petitions for review from BIA decisions. In an October 14, 2005 American Bar Association article, "ASYLUM LOGJAM Streamlined Immigration Cases Are Flooding Federal Appeals Courts," it is suggested that while the BIA's streamlining regulations may have cleared the BIA's "administrative load, it has moved the logjam from the BIA to the federal appeals courts."[5] In a February 2005 Newsletter Of The Federal Courts article, "BIA Appeals Remain High in 2nd and 9th Circuits," it is reported that "[i]n the last four years, administrative agency appeals filed in federal courts from challenges to the decisions of the Board of Immigration Appeals (BIA) have rocketed upward 515 percent. And the Second and Ninth Circuits have seen the greatest number of these cases." "Since fiscal year 2001, for the 12-month periods ending September 30, the Second Circuit saw the number of BIA appeals filed in their circuit increase from 170 to 2,632 in

[5] http://www.abanet.org/journal/redesign/10nimm.html

FY2004, a 1,448 percent increase. In the Ninth Circuit, the 954 BIA appeals filed in FY 2001 increased to 5,368 appeals in FY 2004, for a 463 percent increase."[6]

In a May 2, 2005 LA Times article, "Immigrant Pleas Crushing Federal Appellate Courts," Ninth Circuit Judge Michael Daly Hawkins reported that "[t]hree years ago, immigration cases were 8% of our calendar." "Today, as we speak, that percentage is 48%."[7] In the same article, Judge Dorothy Nelson stated that "[w]e feel overloaded by this problem." "It's just extraordinary. I've been on the court for 25 years, but I've never seen a rush . . . overwhelming us like this. Frankly, the immigration system needs to be reformed." In a September 5, 2004 Sacramento Bee article, "Immigration Appeals Swamp Federal Courts," Chief Ninth Circuit Judge Mary Schroeder reported that "872 immigration appeals were filed in her court in all of 2000, and 2,900 in the first six months of 2004. 'We are very concerned about the possibility that the quality of justice will be adversely affected in immigration cases because of the number,' Schroeder said. She said she and her colleagues also fear other types of cases will suffer from the overload."[8]

In the present case, the quality of justice was adversely affected by the increased number of immigration cases the judges have to adjudicate. It logically follows that if the judge's caseload of immigration cases increases by 500%, the amount of time that the judge can spend in reviewing the immigration case has been severely reduced. It is suggested that the three-judge panel never read Mr. Singh's briefs. The three-judge panel made fundamental errors in rubber-stamping Mr. Singh's petition. Mr. Singh raised two claims of *future* persecution. However, the three-judge panel refused to apply the proper legal standard to the issues raised by Mr. Singh in his petition for review. The standard of review for

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[6] http://www.uscourts.gov/ttb/feb05ttb/bia/

[7] http://www.usdoj.gov/eoir/press/05/ImmigrantPleasLATimes.pdf

[8] http://www.usdoj.gov/eoir/press/ImmigrationAppealsSacBee.pdf

claims of a well-founded fear of *future* persecution is crystal clear: While recognizing that Mr. Singh's subjective fear of *future* persecution must also be objectively reasonable, the Panel failed to recognize that "[a] well-founded fear does *not* require proof that persecution is more likely than not; even a ten percent chance of persecution may establish a well-founded fear." *Malty v. Ashcroft*, 381 F.3d 942, 948 (9th Cir. 2004) (citing *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 480 (1987). In other words, Mr. Singh must show that substantial evidence *compels* a conclusion that there is *up to a ninety percent chance* that Mr. Singh would ***not*** be persecuted if returned to India on account of an imputed political opinion and membership in a particular social group.

Here, the three-judge panel concluded that "[b]ecause the lead Petitioner and his brother—who was persecuted on account of his own imputed political opinion—were differently situated in relevant respects, the record does not **compel a conclusion** that Petitioner **would suffer** the same fate as his brother." Pet. App. 2a (emphasis added). The three-judge panel usurped its judicial obligation when they refused to apply the proper legal analysis in contravention of the following cases: *See I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 431 (1987) (recognizing that "[o]ne can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place."); *Lolong v. Gonzales*, 400 F.3d 1215, 1218 (9th Cir. 2005) (noting that "[e]ven a ten percent chance that the applicant will be persecuted in the future is enough to establish a well-founded fear."); *Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1190 (9th Cir. 2005) (stating that "[a] reasonable possibly may be shown even where the applicant has only a ten percent chance of being persecuted."); *Mamouzian v. Ashcroft*, 390 F.3d 1129, 1135-36 (9th Cir. 2004) (observing that "[t]he reasonableness of the fear must be determined in the political, social and cultural milieu of the place where the petitioner lived[,] and even a ten percent chance of persecution may establish a well-founded fear.");

Himri v. Ashcroft, 378 F.3d 932, 936 (9th Cir. 2004) (noting that to succeed on appeal, the petitioner "must show that the evidence compels the conclusion that there is at least a ten percent chance that he will suffer persecution on account of" a statutory ground.); *Njuguna v. Ashcroft*, 374 F.3d 765, 770 (9th Cir. 2004) (recognizing that a "one in ten chance" that petitioner will suffer persecution is enough to meet the objective component); *Martirosyan v. I.N.S.*, 229 F.3d 903, 909 (9th Cir. 2000) (noting that "[p]roof that there is a 'one in ten chance' of persecution if retuned to his or her native country is sufficient to qualify for asylum."); *Montecino v. I.N.S.*, 915 F.2d 518, 521 (9th Cir. 1990) (stating that petitioner meets the statutory test of eligibility for asylum if "on the basis of objective circumstances personally known to him, believes that he has at least a one in ten chance of being killed by the guerrillas."); *Montecino v. I.N.S.*, 915 F.3d at 520 (also stating that "[b]elief is subjective. Fear is subjective. The trier of fact is to determine what this particular petitioner believed and feared in the light of objective circumstances the petitioner encountered."); *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 440 (1987) (noting that "a moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'").

Under the three-judge panel's reasoning, in order for Mr. Singh to establish his eligibility for a well-founded fear of future persecution, Mr. Singh would have to establish that there was a 100% probability that he would be persecuted if returned to India. The three-judge panel usurped its judicial power by requiring Mr. Singh to establish his eligibility for asylum under this extremely high and insurmountable standard. The three-judge panel, without knowing it, found that Mr. Singh was eligible for asylum based on a well-founded fear of *future* persecution. By stating that "although the record would have supported a conclusion ***different*** than

the one that the BIA reached, a different conclusion is not *compelled*." Pet. App. 2a. What the three-judge panel just unwittingly admitted is that there is a reasonable possibility that Mr. Singh could be persecuted if returned to India. Under *Cardoza-Fonseca*, under the proper legal standard, the three-judge panel should have been indisputably compelled to conclude that Mr. Singh had established his eligibility for a well-founded fear of *future* persecution.

Because it appears that the three-judge panel spent little time in reviewing Mr. Singh's petition, they failed to recognize or address Mr. Singh's due process argument. The three-judge panel reasoned that "the BIA permissibly relied on the fact that Petitioner's mother continued to live unharmed in Punjab." Pet. App. 2a. The BIA stated that "the respondents' family members, including the lead respondent's mother, have remained living in India and offered no evidence to suggest that the family has encountered any problems in the past 11 years . . ." Pet. App. 10a. Mr. Singh entered this country on June 24, 1992. The BIA's opinion was rendered on October 8, 2003, which is eleven years after his entry into this country, and more importantly, more than six years *after* the Immigration Judge rendered his decision in this matter. "Aliens in deportation proceedings are 'entitled to fifth amendment guaranty of due process.'" *Larita-Martinez v. I.N.S.*, 220 F.3d 1092, 1095 (9th Cir. 2000) (citation omitted). "[T]aking administrative notice of post-hearing debatable adjudicative facts without warning and an opportunity to offer rebuttal denies due process of law." *Gonzalez v. I.N.S.*, 82 F.3d 903, 912 (9th Cir. 1996). Contrary to the three-judge panel's reasoning, the BIA could not permissibly rely on the fact that Petitioner's mother continued to live unharmed in Punjab. The three-judge panel usurped its judicial power by failing to address Mr. Singh's due process argument. *See also Jahed v. I.N.S.*, 356 F.3d 991, 1001 (9th Cir. 2004) (recognizing that "[t]he fact that his relatives who remained behind have not been set upon is manifestly irrelevant!").

Moreover, the three-judge panel impermissibly reasoned that "the BIA permissibly relied on the fact that Petitioner had resided safely in New Delhi, even though the police in Punjab reportedly remained interested in him." Pet. App. 2a. The BIA's contention that because "the respondents moved to New Delhi and lived there for a year prior to coming to the United States there without encountering any problems from the police," Pet. App. 10a, to suggest that Mr. Singh's fear of future persecution is not well-founded, conflicts with controlling Ninth Circuit authority: "Lim's failure to leave the Philippines for six years after the first death threat does not render his fear unreasonable. Although relevant, a post-threat harmless period need not vanquish an asylum claim, particularly where significant evidence suggests that the threats are becoming more menacing." *Lim v. I.N.S.*, 224 F.3d 929, 935 (9th Cir. 2000) (emphasis added). Significantly, after leaving for the United States, the Punjab police were still looking for Mr. Singh. "Because after I have reached here I learned it from my mother and maternal uncle that after I reached here that one of those terrorists has been arrested by the police, and from whom they have recovered the money, and the ornaments which were given to him by us. And Punjab police is trying to nab me thinking that I am a supporter of those terrorists." Again, the three-judge panel usurped its judicial power by ignoring controlling precedent.

CONCLUSION

It is crystal clear and indisputable that the three-judge panel had no jurisdiction to address Mr. Singh's asylum and withholding of deportation claim of a well-founded fear of future persecution on account of his membership in the Narinder/Harginder Singh family social group. It is also crystal clear and indisputable that the three-judge panel usurped its judicial power when it rubber-stamped Mr. Singh's petition for review. Mr. Singh's life and freedom are in jeopardy if he and his family are returned to India. Mr. Singh is entitled to more than a potted plant as a consolation

prize. "It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the right." *Rogers v. Alabama*, 192 U.S. 226, 230 (1903). "Judges have to have the humility to recognize that they operate within a system of precedent, shaped by other judges equally striving to live up to the judicial oath."[9]

Mr. Singh and his family respectfully ask the Court to grant the petition for writ of mandamus to compel the three-judge panel to remand the case to the BIA with explicit instructions to rule on their asylum and withholding of deportation claims with a well-reasoned reviewable decision.

Respectfully submitted,

Kenneth J. Ower
6098 Slopeview Court
Castro Valley, CA 94552
(510) 583-0984
Attorney for Petitioners

[9] Chief Justice JOHN ROBERT's opening statement before the Senate Judiciary Committee.

APPENDIX

FILED
MAY 23 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARINDER SINGH; et al.,	)	No. 03-74035
	)	
Petitioners,	)	Agency Nos. A70-669-362
	)	A70-669-363
v.	)	A70-669-364
	)	A70-669-365
ALBERTO R. GONZALES,	)	
Attorney General	)	**MEMORANDUM**
	)	
Respondent.	)	
	)	

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted May 10, 2005
San Francisco, California

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

Petitioner Narinder Singh and his wife and children, who are natives and citizens of India, petition for review of a decision of the Board of Immigration Appeals ("BIA"), on remand from this court, denying their applications for asylum and withholding of deportation. See Narinder Singh v. INS, No. 01-71604, 2002 WL 31863709 (9th Cir. Dec. 29, 2002) (unpublished) (remanding this case to the BIA for further proceedings).

Substantial evidence in the record supports the BIA's conclusion that the lead Petitioner's subjective fear of future persecution by the police is not objectively reasonable. See Mansour v. Ashcroft, 390 F.3d 667, 673 (9th Cir. 2004) (stating that objective reasonableness is a required element). The evidence does not *compel* a contrary conclusion. Kataria v. INS, 232 F.3d 1107, 1112 (9th Cir. 2000).

Because the lead Petitioner and his brother—who was persecuted on account of his own imputed political opinion—were differently situated in relevant respects, the record does not compel a conclusion that Petitioner would suffer the same fate as his brother. In addition, the BIA permissibly relied on the fact that Petitioner had resided safely in New Delhi, even though the police in Punjab reportedly remained interested in him. Finally, the BIA permissibly relied on the fact that Petitioner's mother continued to live unharmed in Punjab. In short, although the record would have supported a conclusion different than the one that the BIA reached, a different conclusion is not *compelled*.

For the same reasons, the record does not compel a conclusion that Petitioners met the higher standard for withholding of deportation. See INS v. Cardoza-Fonseca, 480 U.S. 421, 430 (1987) (stating that the standard for withholding requires a "clear probability of persecution").

PETITION DENIED.

FILED
JUN 14 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARINDER SINGH; et al.,	)	No. 03-74035
	)	
Petitioners,	)	Agency Nos. A70-669-362
	)	A70-669-363
v.	)	A70-669-364
	)	A70-669-365
ALBERTO R. GONZALES,	)	
Attorney General	)	**ORDER**
	)	
Respondent.	)	
	)	

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

The memorandum disposition filed May 23, 2005, is amended as follows:

On page 2, after the second full paragraph, insert the following new paragraph:

> The BIA permissibly concluded that Petitioner's fear of future persecution is not objectively reasonable whether the alleged reason for his fear is an imputed political opinion or, instead, is his family relationship to his brother. See Thomas v. Ashcroft, No. 02-71656, 2005 WL 1313514 (9th Cir. June 3, 2005) (en banc) (holding that a family can be a particular social group). Moreover, there is no evidence that Petitioner's family ties themselves, as distinct from suspected material support of militants, motivated the police.

With this amendment, Petitioners' motion to rescind the memorandum disposition is **DENIED**.

FILED
DEC 20 2002

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARINDER SINGH; KULWANT KAUR; SANDEEP SINGH; NAVNEET SINGH,	)	No. 01-71604
Petitioners,	)	INS Nos. A70-669-362
	)	A70-669-363
v.	)	A70-669-364
	)	A70-669-365
IMMIGRATION AND NATURALIZATION SERVICES	)	**MEMORANDUM**
Respondent.	)	

On Petition for Review of an Order of the
Board of Immigration Appeals

Argued and Submitted November 6, 2002
San Francisco, California

Before: McKEOWN and PAEZ, Circuit Judges, POLLAK, District Judge.

Petitioners appeal from the Board of Immigration Appeals' ("BIA") denial of their petition for asylum and withholding of deportation. Because the petition is based on a claim of persecution by the militants and by the police, we address each issue in turn.

Substantial evidence supports the BIA's conclusion that the lead petitioner Narinder Singh ("Singh") was not persecuted by the militants and did not have a well-founded fear of persecution by the militants based on his race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). Although petitioners raised the issue of religious persecution in their brief before the BIA, the issue is not addressed in their opening brief to this court and thus is waived. To the extent petitioners view religious persecution as part of their claim vis-à-vis the militants, as noted above, substantial evidence supports the BIA's decision.

Singh also argues that police persecution of his brother is evidence of a well-founded fear of persecution based on imputed political opinion. It is unclear, however, whether substantial evidence supports the BIA's conclusion that Singh's fear of the police is not well-founded. We note that the BIA found that Singh was credible. Petitioners' claims are based, in large part, on Singh's testimony that his brother was persecuted by the police. According to the BIA, Singh testified that his brother "was detained for 2 days as a suspected terrorist" and thereafter "went into hiding." A review of the transcript reveals that Singh actually testified that his brother was arrested by the police and tortured for two days while in their custody. Singh also testified that his brother was arrested fifteen days later and had not been heard from since. In ignoring this subsequent arrest and stating erroneously that Singh's brother went into hiding, the BIA misconstrued Singh's testimony and the factual basis for his petition. We cannot determine whether the BIA would have reached a different conclusion if it had correctly understood the factual basis for Singh's claims.

Accordingly, we remand to allow the BIA to address whether Singh's testimony regarding his brother is sufficient, along with other evidence, to establish that petitioners are eligible for asylum or withholding of deportation based on

claimed persecution by the police. INS v. Ventura, 123 S.Ct 353 (2002). In light of this determination, we do not need to reach the due process claim. In all other respects, we deny the petition.

PETITION DENIED in Part and REMANDED in Part.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A 70 669 362 – San Francisco
A 70 669 363
A 70 669 364
A 70 669 365

Date: **Oct 8 2003**

In re: NARINDER SINGH
KULWANT KAUR
SANDEEP SINGH
NAVNEET SINGH

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS: Kenneth Owen, Esq.

ON BEHALF OF DHS: Michelle Guardino
Assistant Chief Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I & N Act [8 U.S.C. § 1251(a)(1)(B)]
In the United States in violation of law (all respondents)

APPLICATION: Asylum; withholding of deportation

This case was last before us on September 5, 2001, when we affirmed an Immigration Judge's decision denying the respondents' applications for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h).[1]

[1] Since amendments made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (enacted Sept. 30, 1996), are not currently applicable to

The respondents appealed this decision. On December 20, 2002, the United States Court of Appeals for the Ninth Circuit remanded this case and instructed the Board to further address the issue of the respondents' eligibility for asylum and withholding of deportation. *Narinder Singh v. INS*, No. 01-71604 (9th Cir. 12/20/02) (unpubl.).

The Ninth Circuit Court of Appeals affirmed the Board's determination that the respondents, natives and citizens of India, had failed to establish that they suffered past persecution or that they had a well-founded fear of the militants. The Ninth Circuit Court of Appeals remanded the case to the Board for further consideration of whether the respondents have a well-founded fear of persecution by the police. Specifically, the Ninth Circuit Court of Appeals noted that the lead respondent's brother was arrested by the police, detained and tortured for 2 days in 1989. *See* Tr. at 30-32. The lead respondent testified that his brother was arrested a second time in 1989 and has not been heard from again (Tr. at 31-33). The issue on remand is whether, given the experiences of the lead respondent's brother, the respondents have a well-founded fear of persecution by the police based on an imputed political opinion.

Upon further consideration of the testimony and evidence in the record, we conclude that the respondents' fear of returning to India is not well-founded. Although the lead respondent testified that he fears that the police will suspect that he is a terrorist if he returns to India, he has offered no evidence to suggest that the police have imputed a political opinion to him. *See Vera-Valera v. INS*, 123 F.3d 1302 (9th Cir. 1997). The police have never arrested or detained the lead respondent, or indicated that they believe him to be a militant. *See* Tr. at 36-42 (the respondent testified that the police asked about him but there is no indication that the police suspected him to be a militant). Although the lead

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the case before us, references herein are made to the Immigration and Nationality Act as it existed prior to IIRIRA's enactment.

respondent argues that he was in constant fear, the respondents moved to New Delhi and lived there for a year prior to coming to the United States there without encountering any problems from the police (Exh. 2, Tr. at 81). As noted in our September 5, 2001 decision, the respondents' family member, including the lead respondent's mother, have remained living in India and offered no evidence to suggest that the family has encountered any problems in the past 11 years (Exh.2; Tr. at 35, 84). *See Matter of A-E-M-*, 21 I&N Dec. 1157 (BIA 1998). We find that the respondents have failed to establish their eligibility for asylum. Because the respondents have failed to satisfy the lower burden of proof required for asylum, it follows that they have also failed to satisfy the clear probability standard of eligibility for withholding of deportation. *See INS. V. Cardoza-Fonseca*, 480 U.S. 421 (1987).

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the Immigration Judge's order.

"s/ John Guendelsberger"
FOR THE BOARD

FILED
AUG 18 2005

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARINDER SINGH; et al.,	)	No. 03-74035
	)	
Petitioners,	)	Agency Nos. A70-669-362
	)	A70-669-363
v.	)	A70-669-364
	)	A70-669-365
ALBERTO R. GONZALES, Attorney General	)	**ORDER**
	)	
Respondent.	)	
	)	

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

The panel has voted to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it.

The petition for rehearing and petition for rehearing en banc are **DENIED**.

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In the Matter of:	)	**INS File Nos.**
	)	**San Francisco**
NARINDER SINGH	)	**A70-669-362**
KULWANT KAUR	)	**A70-669-363**
SANDEEP SINGH	)	**A70-669-364**
NAVNEET SINGH	)	**A70-669-365**
	)	
On Remand from	)	
Ninth Circuit Court of Appeals	)	

BRIEF IN SUPPORT OF REMAND FROM
NINTH CIRCUIT COURT OF APPEALS

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D. MR. SINGH'S WELL-FOUNDED FEAR OF FUTURE PERSECUTION IS BASED IN PART ON THE PAST PERSECUTION OF HIS BROTHER

Mr. Singh was extremely lucky. Because he went into hiding in 1989, he was able to avoid being arrested, tortured, and possibly killed by the Punjab police. He, therefore, does not claim past persecution by the Punjab police. Mr. Singh's claim is that "[a]cts of violence against the applicant's friends and family may establish a well-founded fear [of future persecution] where these acts create a pattern of persecution closely tied to the petitioner. Cordon-Garcia v. I.N.S., 204 F.3d 985, 991 (9th Cir. 2000) (citations omitted). As previously discussed, Mr. Singh's brother was persecuted, and most likely killed, by the Punjab police on account of an imputed political opinion. Mr. Singh also testified that his 75-year-old father was affected by these incidents, and that his father died on December 14, 1989, of a heart attack. ER 93, 96, 155 (Death Certificate).

Mr. Singh testified that the police suspected him of being a militant like his brother. The reason for that belief was that "their suspicion was converted into reality when my brother was taken away by the police. That they had arrested my brother, they could do the same to me under the same circumstances." ER 98-99. As in the present case, the petitioner in *Cordon-Garcia v. I.N.S.* testified that "she would not return to Guatemala today '[b]ecause my family has always told me that they are looking for me. I'm being sought out and they killed my father and later they killed my uncle, then the same thing will happen to me.'" Cordon-Garcia v. I.N.S., 204 F.3d at 992. "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, 'the inference that they are connected and politically motivated is an appropriate one.'" Navas v. I.N.S., 217 F.3d 646, 661 (9th Cir. 2000) (citing *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir.1985). The Court went on to conclude that "where two

members of Navas's family were the victims of politically-motivated murders, and where Navas's political activities were known to his persecutors, the inference *must* be that Navas's persecution was, *at least in part*, on account of political opinion." Id. at 661 (italics in original).

The Board of Immigration appeals has also recognized that "[w]here the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear [of future persecution], in other words, can be based on what has happened to others who are similarly situated. The situation of each person, however, must be assessed on its own merits. *See Handbook, supra,* at para. 43." Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987). The BIA noted that "this standard contemplates the introduction of evidence regarding similarly situated persons to support an *individual* claim of persecution. This situation is distinct from the use of evidence of the persecution of similarly situated persons to establish a well-founded fear of persecution *where there is no claim of individualized persecution*, i.e., in a pattern or practice claim. *See* 8 C.F.R. § 208.13(b)(2)([iii])." Matter of S-M-J-, 21 I&N Dec. 722, 726 n. 1 (BIA 1997) (italics in original).

In the present case, Mr. Singh and his brother were both perceived to be members of the Sikh militants. The police accused Mr. Singh's brother of being a militant, and tortured him in order to obtain information regarding the Khalistan militants. ER 92, ER51. Mr. Singh also testified that "according to police it was proved that I'm a militant too, . . ." ER 97. "Typically, where killings and other acts of violence are inflicted on members of the same family by government forces, 'the inference that they are connected and politically motivated is an appropriate one.'" Navas v. I.N.S., 217 F.3d 646, 661 (9th Cir. 2000) (citing *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir.1985) (emphasis

added). *See* Cordon-Garcia v. I.N.S., 204 F.3d 985, 991 (9th Cir. 2000) (recognizing that "persecution was 'on account of" one or more of the specified grounds may be shown by inference where the inference is one that may clearly be drawn form the facts in evidence.").

Federal Regulations adopted in 1990 "specifically states that an applicant is *not* required to show that he has been 'singled out individually for persecution . . . if he establishes that there is a pattern or practice in his country . . . of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion.' 8 C.F.R. § 208.13(b)(2)([iii])." Singh v. I.N.S., 94 F.3d 1353, 1359 (9th Cir. 1996) (italics in original). "Even where an applicant fails to establish a 'pattern or practice' of persecution' of a particular group, the severity of the discrimination, harassment, or violence directed at members of that group will determine the kind of individualized showing that will be required of an asylum applicant, who is a member of that group." *Id.* at 1359 (citation omitted) (emphasis added). The Court went on to state that "[t]he more the group to which an applicant belongs is discriminated against, harassed, or subjected to violence, the less the individualized showing an applicant must make to establish eligibility for asylum." *Id.* at 1359 (citations omitted). In other words, there is a sliding scale of proof (0 for a pattern or practice claim to 100 for no persecution of the particular group) required of asylum applicants based on the amount of persecution the groups they belong, or are suspected of belonging to, are subjected to. *See also* Hoxha v. Ashcroft, 319 F.3d 1179, 1182 (9th Cir. 2003) (observing that "the level of individualized targeting that he must shown is inversely related to the degree of persecution directed toward ethnic Albanians generally.").

In Punjab, it has generally been established that "'investigations' of many suspected terrorists are not legitimate

government functions but rather part of a pattern of political suppression." Singh v. Ilchert, 63 F.3d 1501, 1508 (9th Cir. 1995) (footnote omitted) (emphasis added). More specifically, the Ninth Circuit has noted that:

> The 1996 country conditions profile of India provides that "[f]rom the early 1980's until late 1993 or early 1994, there was considerable violence in the state of Punjab between Sikh militants on the one side and the law enforcement authorities of the Indian Government and Punjab state on the other. The countermeasures taken by the law enforcement authorities resulted in hundreds of additional deaths. Several thousand people, including Sikh militants and uninvolved persons from all religious groups as well as government officials, died during the extended period of confrontation in the 1980's and early 1990's." Although the profile states that the number of arrests/killings has declined significantly since late 1993—early 1994, the profile also states that the Indian Human Rights commission found that "[d]espite this improvement, the authorities continued to commit extrajudicial killings in 1994." The profile also describes the level of violence in the Punjab as only "lower."

Kataria v. I.N.S., 232 F.3d 1107, 1115 (9th Cir. 2000) (emphasis added). Because Mr. Singh and his brother were perceived by the Punjab police to be members of the Sikh militants, and because of the pattern or practice of persecution of Sikh militants by the Punjab police, Mr. Singh is not required to show that he has been singled out individually for persecution. *See* 8 C.F.R. § 208.13(b)(2)(iii).[2]

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[2] Mr. Singh asks the BIA to take administrative notice of the general country conditions of Punjab, India that have been established by the

Even assuming, for the sake of argument, that the "'members of the disfavored group[ ] are not threatened by systematic persecution of the group's entire membership, the fact of group membership nonetheless places them at some risk.'" Singh v. I.N.S., 94 F.3d 1353, 1359 (9th Cir. 1996) (citation omitted). Thus, even if the BIA should find that there is no pattern of political persecution in Punjab against Sikh militants and uninvolved persons from other religious groups, Mr. Singh's proof of individualized persecution, if he were returned to India, would be extremely low to establish his eligibility for asylum. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987) (recognizing that a well-founded fear may be based on no more than a ten percent chance of actual persecution). And given the pattern of persecution that has been established in Punjab, India, a much less than ten percent showing would be required to establish eligibility for asylum in the present case. Therefore, even though Mr. Singh was never harmed in the past by the police, the Ninth Circuit has "held that acts of violence against a petitioner's friends or family members may establish a well-founded fear, notwithstanding an utter lack of persecution against the petitioner [himself]." Arriaga-Barrientos v. U.S.I.N.S., 937 F.2d 411, 414 (9th Cir. 1991) (citation omitted) (emphasis added). *See also* Hoxha v. Ashcroft, 319 F.3d 1179, 1183 (9th Cir. 2003) (recognizing that "the level of individualized risk Hoxha must show in order to establish a well-founded fear of future persecution is comparatively low.").

E. MR. SINGH'S WELL-FOUNDED FEAR OF FUTURE PERSECUTION IS ON ACCOUNT HIS MEMBERSHIP IN A PARTICULAR SOCIAL GROUP

The concept that a well-founded fear can be based on what has happened to others who are similarly situated has

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Ninth Circuit in Singh v. Ilchert, 63 F.3d 1501, 1508 and 1508 n. 3 (9th Cir. 1995) and Kataria v. I.N.S., 232 F.3d 1107, 1115 (9th Cir. 2000).

been around for at least a couple of decades. *See* Matter of Mogharrabi, 19 I&N Dec. 439, 445-46 (BIA 1987) (referring to the "Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979) ('*Handbook*')" at paragraph 43). As previously discussed, if Mr. Singh "is able to show a 'pattern or practice' of persecution against a group of which [he] is a member, then [he] will be eligible for asylum." Mgoian v. I.N.S., 184 F.3d 1029, 1035 (9th Cir. 1999) (citation omitted).

The Ninth Circuit has noted that "this group of similarly situated persons is not necessarily the same as the more limited social group category mentioned in the asylum statute. In this context, we have held that a particular social group implies a collection of people closely affiliated with each other, with the prototypical example of a particular social group[] consist[ing] of the immediate members of a certain family . . . Thus, it should now be clear that a pattern of persecution targeting a given family [(Narinder and Harginder Singh)]that plays a prominent role in a minority group [(suspected Sikh militants)] that is the object of widespread hostile treatment supports a well-founded fear of persecution by its surviving members." *Id.* at 1036 (citations and internal quotation marks omitted) (emphasis added). It would appear that the Court is now saying that, *in general*, a well-founded fear of future persecution based on what has happened to others who are similarly situated, can more *specifically* be considered or classified as persecution on account of membership in a particular social group, where the group consists of the immediate members of a certain family. Thus, the particular social group in the present case is the Narinder/Harginder Singh family social group and that Narinder Singh fears future persecution on account of his membership in that group (suspected Sikh militants), which is a part of the larger Sikh militants group that is routinely

persecuted by the Punjab police. *See also* Aguirre-Cervantes v. I.N.S., 242 F.3d 1169, 1176 (9th Cir. 2001) (holding that "a family group may qualify as a particular social group within the meaning of 8 U.S.C. § 1101(a)(42)(A).").

In another similar case, an asylum applicant, who was unable to pay his mother's $175,000 debt, "testified to his fear of imprisonment by the People's Republic of China (the PRC) and of reprisal and torture by the snakeheads if he was returned to the PRC." Chen v. Ashcroft, 289 F.3d 1113, 1114 (9th Cir. 2002). "The Board in an opinion agreed with Chen as follows: 'The family has been recognized as a social group, such that persecution on account of a family membership can serve as a basis for asylum.' But the Board went on to say: 'The claim fails because, if imprisoned, the respondent would not be imprisoned merely because of his status as a member of a particular social group. Rather, if the respondent is imprisoned, it would be because the government has imputed to the respondent responsibility for a criminal offense committed by members of the group. Thus, even though his family may be considered a particular social group, his imprisonment would not be on account of his membership in that particular group." *Id.* at 1115 (citations omitted).

The issue in *Chen v. I.N.S.* was "whether punishment of a family member for a crime committed by his mother is punishment for the crime or is punishment 'on account of' membership in the family." *Id.* at 1116. The Court recognized that "it is only on account of membership in the family that Jian Chen would be deemed punishable." *Id.* The Ninth Circuit then concluded that "Chen has provided credible evidence, subjective and objective, of fear of future persecution by the PRC on account of his membership in his [own] family." *Id.* The Court also concluded that "if returned to the PRC, it is more likely than not that Jian Chen, persecuted on account of his family, will not only be imprisoned but, with the acquiescence of the PRC, tortured

and killed while in prison. *Id.* at 1116-17. In the present case, if Mr. Singh is forced to return to India, he will be the last member of the Narinder/Harginder Singh family social group and, therefore, at particular risk. *See* Mgoian v. I.N.S., 184 F.3d 1029, 1035 (9th Cir. 1999) (recognizing that if Mgoian is returned to her home country "she will be the last of the Mgoians in Armenia and, therefore, at particular risk.").

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NARINDER SINGH; et al.,	)	No. 03-74035
	)	
Petitioners,	)	Agency Nos. A70-669-362
	)	A70-669-363
v.	)	A70-669-364
	)	A70-669-365
ALBERTO R. GONZALES,	)	
Attorney General	)	**ORDER**
	)	
Respondent.	)	
	)	

Before: KLEINFELD, HAWKINS, and GRABER, Circuit Judges.

Petitioners' Motion to Recall the Mandate is GRANTED. The mandate issued August 26, 2005, is recalled and issuance of the mandate is stayed pending the filing of a petition for writ of certiorari within 90 days of the date of this order. In the event that the petition for writ of certiorari is timely filed, the stay shall continue until final disposition by the Supreme Court. If no timely petition for writ of certiorari is filed, the stay shall expire 90 days from the date of this order.